

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE STEP III) Case No. 276-2013
GRIEVANCE OF VALERIE RIDGEWAY)
) **RECOMMENDED DECISION**
)

* * * * *

I. INTRODUCTION

In this matter, Valerie Ridgeway pursues her third step in her grievance arising out of her discharge from her employment as a registered nurse (RN) with the Department of Public Health and Human Services (DPHHS). Hearing Officer Gregory L. Hanchett received notice of his selection to preside over this matter on August 16, 2012. Immediately after receiving notice of his appointment, the hearing officer held a scheduling conference with the parties at which time the parties asked and agreed to hold a hearing in this matter on September 25, 2012. At the contested case hearing, Ridgeway represented herself. Vicki Knudsen, agency legal counsel, represented DPHHS. Ridgeway, Travis Tillman, Human Resources Officer, Ron Balas, Superintendent of the MMHNCC, Will Bryson, Former DPHHS Human Resources Officer, and Linda Vachowski, DPHHS attorney, all testified under oath. Grievant Exhibits 1 through 15 and DPHHS Exhibits A through V were admitted into evidence by stipulation. DPHHS's Exhibit O was admitted at hearing over the grievant's objection. Based on the evidence adduced at the hearing and the arguments made during closing statements, the hearing officer makes the following findings of fact, conclusions of law, and recommended decision.¹

II. ISSUE

Was Ridgeway aggrieved in a serious matter of her employment when she was discharged?

¹ At hearing, Ridgeway objected to the admission of DPHHS's Exhibit O, handwritten notes purportedly prepared by Kathy Bramer. The hearing officer admitted the document, noting that the formal rules of evidence do not apply to these proceedings and noting further that he would give it the weight it was due. In light of the fact that the document is hearsay and there is no evidence that anyone who testified at the hearing was present when the document was prepared and the preparer did not testify, the hearing officer accords no weight to the exhibit and has not relied upon it in reaching his decision in this matter.

III. FACTS

1. Ridgeway is a licensed RN. At all times material to this case, she has suffered from strong allergic reactions to natural and synthetic latex and other allergens. Her allergic reactions to latex can and have included potentially life threatening anaphylactic reactions which necessitate the use of epinephrine to alleviate the symptoms of the reactions. She also has available for her use an inhaler to alleviate the breathing difficulties she experiences when she has such a reaction.

2. On July 25, 2010, DPHHS hired Ridgeway to work as an RN at the DPHHS's Montana Mental Health Nursing Care Center (MMHNCC) in Lewistown, Montana. The MMHNCC is a very large facility containing several wings that house patients who are severely mentally ill. These patients have been transferred to MMHNCC from the Montana State Hospital at Warm Springs because their mental illness is no longer amenable to treatment and recovery from their mental illness is not likely and they can no longer function on their own. Testimony of Will Bryson.

3. Ridgeway's position description demonstrates that as an RN at MMHNCC she was responsible for the complete care of patients at the facility. This care included, if necessary, split second decisions on the use of restraints to protect residents from injuring themselves or others and includes the use of "time outs, waist restraint . . . PRN medications." Exhibit 5, page 3.

4. Ridgeway's acute allergic reaction to both natural and synthetic latex could, if not properly controlled, impede her ability to intercede and carry out her job duties during an emergency involving an MMHNCC patient and could potentially create a life threatening situation for either her or the patient. Because of this concern, Ridgeway and MMHNCC inserted an additional job requirement in her job description. That requirement stated specifically:

Type I & Type IV LATEX Allergy

Need to provide environment free of natural rubber latex and limit potential exposures. Make available alternative products & procedures [other] than latex.

Reasonable accommodation is expected of the employer.

In the event of allergic reaction, employee must be able to treat & immediately remove threat.

Exhibit 5, page 6.

5. In addition to the above, when Ridgeway was hired, she specifically told her employer that she would be able to identify an allergic reaction and she would be able to self medicate. Exhibit B.

6. In order to uphold its duties to reasonably accommodate Ridgeway, MMHNCC took several steps to remove the triggers for Ridgeway's allergy. This included (1) replacing all the catheters in the facility with non-latex catheters, (2) eliminating the use of any latex gloves in the facility, (3) removing patient exercise balls and balloons that contained any latex, (4) removing plants in the facility that might contain natural latex, and (5) removing white construction paste used by the residents in making crafts because it might contain latex.

7. On Thursday, September 30, 2010, and Friday, October 1, 2010, Ridgeway attended training being held at MMHNCC. At approximately 1:30 p.m. on Friday, Ridgeway had a severe allergic reaction (henceforth referred to as the September 30 incident).² Initially, Ridgeway complained to the instructor of something coming from the facility's laundry that was causing her some difficulty in breathing. Ridgeway was permitted to leave the training and went outside for some fresh air. She then returned to the training and completed an additional test.

8. At 2:30 p.m., Ridgeway complained again that something from the laundry was bothering her. Ridgeway and her instructor went outside to permit Ridgeway to get some fresh air. As they exited the building together, the instructor observed that Ridgeway was having trouble breathing as her respiratory rate had increased and her breaths had become audible. The instructor asked Ridgeway if she was alright and Ridgeway responded that she was not alright. Ridgeway then used her inhaler in an effort to alleviate the breathing problems she was experiencing. The two inhaler puffs did not alleviate the problem. The instructor then asked Ridgeway if she was in distress and Ridgeway responded that she did not know if she was in distress, even though it was apparent to the instructor that Ridgeway was in distress.

² The shorthand denomination for this incident in the parties' testimony and exhibits is the "September 30, 2010" incident, even though the allergic reaction occurred on October 1, 2010. Because the parties have referred to this as the September 30 incident, the hearing officer will do the same even though the incident occurred on October 1, 2010.

9. The instructor responded to Ridgeway that Ridgeway was in distress. Ridgeway then sat down on a bench. Charge Nurse Debi Moore (also an RN) administered an epinephrine shot to Ridgeway but it did not stem Ridgeway's symptoms. Her breathing continued to be deep and rapid, her breaths were audible, and she was demonstrating restlessness. Moore then administered a second shot to Ridgeway. The instructor asked Ridgeway whether she would like to go to the hospital and Ridgeway replied that she could not go to the hospital. The instructor asked Ridgeway if there was anything else they could do and Ridgeway indicated that they could administer oxygen from Ridgeway's portable oxygen tank that she kept in her car.

10. Another nurse retrieved Ridgeway's oxygen and administered it to Ridgeway. Ridgeway told the instructor that she did not like the way that the second epinephrine shot felt. Ridgeway also told her instructor that if she began to take her clothes off they should stop her. Approximately 5 minutes later, Ridgeway's symptoms began to subside. Ridgeway was unable to complete the rest of her class that day.

11. During the September 30 incident, Ridgeway was unable to treat herself. She also seemed to have difficulty identifying that she was going into an allergic reaction and what the cause of the reaction might be. Ridgeway herself noted this in her October 5, 2010 e-mail to Linda Unmack. Exhibit D. In that e-mail, she stated that perhaps she "waited too long for both the oxygen & the epinephrine, . . ."

12. On October 4, 2010, Denice Marshall sent DPHHS human resources officer Kathy Bramer and DPHHS human resources lawyer Laura Vachowski an e-mail expressing concern about the implications of Ridgeway's allergic reaction on her ability to safely perform her job as an RN. Marshall noted that they could not identify any latex that might have been in the area that could have caused Ridgeway's reaction on October 1. Marshall also expressed concern that Ridgeway worked night shift and was at times alone by herself on a unit, stating "We have seen that she was not able to give herself an injection and could have a reaction where no one would be there to observe this or treat her." Exhibit B.

13. Bramer responded to Marshall's e-mail indicating that DPHHS would ask their Americans With Disabilities Act (ADA) coordinator, Patty Smith, to further investigate the situation and begin a dialogue with Ridgeway. Bramer further noted that MMHNCC might not be able to provide a reasonable accommodation for Ridgeway but that DPHHS would conduct an assessment of Ridgeway's situation.

14. After the September 30 incident, MMHNCC took further steps to accommodate Ridgeway's allergies. They scheduled her around construction, which

included not scheduling her on days that construction would be occurring and by assigning her to duty in wings that did not have construction going on. In addition, material safety data sheets on products being used in the MMHNCC building were made available to employees in the employee dining room.

15. In order to combat the problem, MMHNCC also took steps to try to isolate all of the triggers at the facility that might cause a reaction in Ridgeway. Balas had discussions with Ridgeway on three occasions to try and pinpoint the triggers that might set off an allergic reaction in Ridgeway. From MMHNCC's perspective, the problem was essentially a moving target. As Balas testified, and the hearing officer finds, Balas asked Ridgeway to provide a list of products that she was allergic to, but Ridgeway failed to do so.

16. In light of the inability of either Ridgeway or MMHNCC to pinpoint the trigger that caused her reaction, DPHHS decided to complete additional assessments on Ridgeway in an effort to pinpoint the triggers that might still exist at the facility. To this end, on October 18, 2010, Smith asked Ridgeway to either submit to an independent medical examination or provide a release of information request to the medical professional who had been treating Ridgeway for her allergies so that DPHHS could get a better understanding of the scope of Ridgeway's allergies. Ridgeway did not immediately provide the release and on November 16, 2010, Patty Smith again e-mailed a request to Ridgeway for the release.

17. Ridgeway did not respond to the November 16 e-mail so on December 13, 2010, Will Bryson, DPHHS EEO specialist and acting ADA coordinator, sent her a letter reiterating that Ridgeway must either submit to an independent medical examination or provide a signed release. Exhibit G. Bryson laid out the reasons for the request, noting that DPHHS was requesting the medical release to determine, in light of her allergic reaction during the September 30 incident, whether Ridgeway posed a "direct threat to herself and/or to Montana Mental Health Nursing Care Center (MMHNCC) clients" such that she could not perform the essential functions of her job. *Id.*

18. Ridgeway provided the signed release to DPHHS on December 20, 2010 permitting DPHHS to obtain information from her medical provider, Rosemary Youderian, FNP (family nurse practitioner). Youderian responded to Bryson on December 22, 2010, noting that Ridgeway did indeed have a "life threatening" allergy to latex. Exhibit I. The response also indicated that patient care areas where Ridgeway worked needed to be latex free. This included "ensuring the absence of all latex medical and patient care supplies, latex balloons, bananas, avocados, rubber plants, new carpet, fungicidal paints, laminates, foam rubber, adhesives or sealants until dried, or rubber belts such as in vacuum cleaners." *Id.* Finally, the letter noted

that with proper attention to avoiding Latex exposure, Ridgeway would be able to function as a valuable employee at MMHNCC. *Id.*

19. The hospital felt that Youdarian's initial response was too broad to enable the hospital to take appropriate action to determine whether Ridgeway's condition prevented her from safely engaging in the essential functions of her job. As a result, Bryson sent an additional request for information seeking more specific information such as (1) the nature and severity of Ridgeway's condition, (2) whether the list of items that Youdarian listed in her previous letter suggested as triggers was comprehensive and if not, a request that Youdarian provide a comprehensive list of triggers, (3) the estimated time between exposure to Latex and onset of symptoms, (4) the extent of contact necessary to cause a reaction, and (5) additional recommendations for accommodations to Ridgeway that would reduce or eliminate Ridgeway's potential for reaction in the workplace. Exhibit J.

20. Youdarian's responses were for the most part very general. For example, instead of responding to the request for the specific items that might cause an allergic reaction, Youdarian responded that Ridgeway "has extensive knowledge related to triggers." She also stated that in essence anything associated with natural latex and that "carbomates are triggers only when vulcanizing." Exhibit J.

21. MMHNCC decided after receiving Youdarian's responses that they would continue to work with Ridgeway to accommodate her allergy sensitivity. In this regard, Ridgeway's supervisors continued to schedule her around construction so that she would not accidentally be exposed to the natural latex triggers that her medical care provider had identified as triggers.

22. As time progressed, it became apparent that Ridgeway was also allergic to synthetic latex and other allergens. In one instance, she had a reaction to pest control spraying at the facility.

23. In an ongoing effort to be vigilant in removing triggers and reducing Ridgeway's exposure to triggers, MMHNCC continued to engage in interactive discussions with Ridgeway in order to attempt to accommodate her allergies. This continued to include removal of latex triggers in all areas of the facility and efforts to pinpoint and remove other triggers. These accommodations also involved scheduling Ridgeway around construction by either not scheduling her to work on days when construction was occurring or assigning her to areas of the facility where construction was not occurring.

24. Despite MMHNCC's efforts, Ridgeway continued to be frustrated by her apparent susceptibility to latex and other allergy inducing triggers. In an e-mail to

Linda Unmack on March 16, 2011, Ridgeway disclosed additional allergy flare ups which she continued to suffer despite the efforts that MMHNCC had taken. She complained that she had not had a “full blown reaction,” but that she was suffering from asthma that was flaring up from exposure to the ongoing construction at work, the “increased workload to breathe and dinner plate sized hives that don’t quit itching.” Exhibit L. She further cautioned Unmack that she wanted to keep her rant confidential and that she hoped to work out a solution. *Id.*

25. Ridgeway continued to complain about the building maintenance and the problems it was causing her.

26. On December 30, 2011, Ridgeway was working the night shift on the D and F Wings at the facility. Her duties on F Wing were assigned to her because she had indicated to her supervisors that it had been long enough since the floor replacement in that wing that she would be able to work that wing without any problems. With an hour and one-half remaining in her shift, Ridgeway entered a storage closet on F Wing to obtain isolation supplies for a resident. Something in there, perhaps a device known as a synthetic arm (See Exhibit P), triggered an anaphylactic reaction.

27. Instead of attempting to seek out help, Ridgeway placed herself in a back room near the nurse’s station on the D Wing. She made no effort to contact anyone else to advise that she was having a reaction even though she had both a radio and the nurse’s station telephone available to her to call for assistance. Ridgeway administered an epinephrine shot to herself three times and used her inhaler numerous times, but apparently to no avail.

28. A co-worker found Ridgeway in the back room. The co-worker took Ridgeway outside but her reaction continued to worsen. Ridgeway asked another nurse, Debbie Lindenfeld, to administer a fourth epinephrine shot to her. Lindenfeld did so and also retrieved Ridgeway’s oxygen from Ridgeway’s car and administered it. Eventually, Ridgeway’s breathing improved and her symptoms subsided. During the reaction, Ridgeway was unable to perform the essential functions of her job. Had an emergency developed for one of the residents, Ridgeway would have been unable to respond.

29. In order to ensure no adverse effects to Ridgeway from the copious amounts of epinephrine needed to combat an anaphylactic reaction, she carries nitroglycerin medication as part of her medical kit to combat the threat of anaphylactic reactions. During the December 30 reaction, she could not find her nitroglycerin medication as it was not packed in her medical kit. At the hearing in

this matter, Ridgeway testified that someone had forgotten to replace it in the pack at some point prior to the December 30 incident.

30. Because this incident was Ridgeway's second incident where she was unable to self treat and unable to remove herself from the situation, DPHHS undertook additional analysis of Ridgeway's working situation to determine whether her life threatening allergy created a direct threat to either herself or facility patients. In a letter dated March 7, 2012, DPHHS placed Ridgeway on paid administrative leave pending Ridgeway's obtaining additional information from an allergist. DPHHS's action was reasonable given MMHNCC's inability to identify with definiteness allergic triggers that could harm Ridgeway, despite reasonable and repeated efforts to do so, and Ridgeway's demonstrated inability on two occasions to control her reaction in the workplace.

31. The March 7, 2012 letter explained in detail the basis for DPHHS's finding that Ridgeway posed a direct threat to herself as well as the patients in the facility. The letter noted that MMHNCC had undertaken its best efforts to reduce Ridgeway's exposure after the September 30 incident, but it had been to no avail. The letter pointed out that MMHNCC had obtained detailed information from Ridgeway's medical provider in an effort to confront the problem and accommodate Ridgeway's allergy in the workplace. The letter further explained that despite these efforts, Ridgeway still had a second anaphylactic reaction toward the end of her December 30, 2011 shift and that Ridgeway once again needed assistance and that she had not contacted anyone for assistance despite the ability to do so. Finally, the letter informed Ridgeway that she must provide information from an immunology expert that she was not a direct threat in her job position.

32. Ridgeway consulted with Dr. Richard Buswell, M.D., an allergy and immunology expert, and on April 24, 2012, Dr. Buswell responded to questions posed by DPHHS about Ridgeway's allergy. Exhibit R. Among other things, Dr. Buswell noted that Ridgeway was "largely able to predict situations that will precipitate an allergic reaction and avoid them accordingly." *Id.*, Exhibit R, page 2. Dr. Buswell further opined that Ridgeway would occasionally encounter an exposure that she had not anticipated which "results in her having to treat herself." *Id.*

33. On May 30, 2012, Director of Nursing Moore provided Ridgeway a letter in conformity with her *Loudermill*, *infra*, rights indicating that DPHHS was considering terminating Ridgeway's employment due to the fact that Ridgeway's allergy and her inability to control it at work created a direct threat to herself and the patients at MMHNCC. Exhibit S. The letter pointed out the reason why Buswell's report did not overcome DPHHS's determination that Ridgeway posed a direct threat to herself and the patients. In doing so, the letter stated:

Dr. Buswell states that the likelihood of incapacity as a result of these reactions are mitigated because you are “largely able to predict situations” where you may become incapacitated, that you are “experienced” in taking care of problematic situations, and that you should be able to “manage” these risks “as [you] have done so successfully over the years” he has followed you. Your own failure to successfully manage the two episodes of incapacity you experienced at MMHNCC, however, belies your medical provider’s estimation that you are able to successfully manage such situations without assistance. Dr. Buswell’s letter offers no suggestion of any way to eliminate the serious risk to your health and safety resulting from allergic reactions aside from your own ability to predict or anticipate situations precipitating allergic reactions and, when you haven’t been able to predict reactions, your own ability to treat yourself. On both occasions, however, you were unable to specifically identify what triggered the episode, you did not have the medical equipment and/or prescription medication needed to manage the situation without outside medical intervention, and you were not able to self-administer needed medication or to relocate to another area without assistance.

The letter also informed Ridgeway that prior to making the decision as to whether her employment should be terminated, Moore wanted Ridgeway to respond to the concerns listed in the letter no later than June 8, 2012.

34. On June 7, 2012, Ridgeway responded. Exhibit T. In her response, Ridgeway argued in essence that she did not pose a direct threat to the residents because the residents could under no circumstance get emergent care they needed at the facility. She conceded that during the December 30 reaction, she waited longer than perhaps she should have to start treating her symptoms, arguing that she did so out of fear of “investigative harassment.” *Id.*, page 2. She reiterated in a subsequent letter seeking a grievance that “My mistake was waiting too long to administer self treatment [during the December 30 shift reaction] due to denial and fear or [sic] retribution.” Exhibit V, page 1.

35. On July 9, 2012, Moore responded on behalf of DPHHS with a letter terminating Ridgeway’s employment, noting that nothing she had presented in her June 7, 2012 letter provided any basis to reconsider proposed discharge. The letter reiterated that Ridgeway’s demonstrated inability to self treat and to remove herself from the threatening situation, coupled with the inability despite repeated and substantial efforts to provide a reasonable accommodation that still met the needs of the facility, left DPHHS with no choice but to discharge her because Ridgeway was

“a direct threat to herself and/or MMHNCC’s residents and no reasonable accommodation exists that may eliminate or notably reduce the direct threat. . . .”

IV. DISCUSSION

In her grievance, Ridgeway attacks her discharge from DPHHS upon two grounds. Her primary argument is that she did not pose a direct threat to herself or patients at MMHNCC even though she twice had such severe allergic reactions that she was incapacitated and on neither occasion could she self medicate or remove herself from the situation. Her secondary argument, one she made at hearing, is that she had no idea that disciplinary action was being contemplated against her until she received the letter from Nursing Director Moore on May 30, 2012. The hearing officer construes this latter argument to effectively be one that she was denied the process she was due in this grievance proceeding. Neither basis provides a reason for sustaining her grievance.

An employee challenging an adverse employment action must show by a preponderance of the evidence that he was aggrieved in a matter of his employment. Mont. Code Ann. § 2-18-1012. Formal adverse action against a state employee must be administered for just cause. Admin. R. Mont. 2.21.6506. “Just cause” for taking action is defined as “reasonable job related grounds for taking disciplinary action based on a failure to satisfactorily perform job duties, or disruption of agency functions.” Admin. R. Mont. 2.21.6507(8). Providing due process to an employee in a discharge proceeding requires an employer to ensure (1) that the employee is made aware of the action being taken and the reason for it; and (2) that the employee has an opportunity to respond to the action and to defend or explain the questioned behavior or actions. Admin. R. Mont. 2.21.6509. *See also, Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 544 (1985). *Wolny v. City of Bozeman*, 2001 MT 166, ¶18, 306 Mont. 137, 30 P.3d 1085; *Boreen v. Christensen*, 267 Mont. 405, 420, 884 P.2d 761, 770 (1994).

Ridgeway’s contention that there was no just cause for discharging her under the circumstances is unsustainable. Cognizant of Ridgeway’s severe allergic reaction to latex products and the obvious detrimental effects upon her ability to perform her job functions that a reaction could cause, Ridgeway and her employer specifically agreed at the outset of Ridgeway’s employment that “In the event of allergic reaction, employee must be able to treat & immediately remove threat.” Exhibit 5, page 6. On two occasions, Ridgeway demonstrated herself incapable of doing so. During the first event, Ridgeway needed assistance to overcome the potentially life threatening and obviously incapacitating effects of her anaphylactic reaction. During the second event in December 2011, not only was Ridgeway unable to self treat and thus rendered incapacitated, she did not even take the rudimentary step of seeking

assistance. On each occasion, her incapacitation due to her allergic reaction rendered her incapable of performing her job duties while she was suffering from the reaction. On each of these occasions, by her own admission, she was slow to react to the situation. Ridgeway was unable to conform to the tenets of her employment agreement.

Ridgeway's inability to perform the essential functions of her job was not due to DPHHS's failure at efforts to accommodate her allergy. DPPHS made numerous reasonable and more than reasonable efforts to accommodate Ridgeway. In addition to managing her schedule in an effort to keep her out of contact with triggers in construction areas, DPHHS replaced all the catheters in the facility with non-latex catheters, eliminated latex gloves in the facility, removed patient exercise balls and balloons that contained any latex, removed plants in the facility that might contain natural latex, and even went so far as to remove white construction paste used by the residents in making crafts. Despite these measures, Ridgeway continued to show sensitivity to triggers that could neither be pinpointed nor identified.

In addition to the above, DPHHS on two occasions sought information from Ridgeway's treating medical providers in an effort to better understand the nature of her allergy and in order to better understand the types of allergic triggers to which she might succumb. As Balas' testimony shows, the list of triggers seemed to be a moving target and it is evident that MMHNCC could not provide an accommodation without substantially compromising its mission of being a service provider to severely mentally ill patients.

The fact that no emergency involving a patient occurred during the second allergic reaction does nothing to lessen its occurrence as a legitimate basis for finding that Ridgeway could not conform to the tenets of the employment agreement and could not perform the essential functions of her job. Ridgeway has provided no authority or argument that the threat of such incapacitation which renders an employee incapable of performing an essential function of her job is insufficient to support just cause for the discharge here.

As for the issue regarding due process, DPHHS gave Ridgeway the process to which she was entitled. She was provided a *Loudermill* letter on May 30, 2012 and given a reasonable amount of time to respond. That is all the applicable rules and case law require. Ridgeway has failed to demonstrate by a preponderance of the evidence that she has been aggrieved as contemplated within Mont. Code Ann. § 2-18-1012.

V. RECOMMENDED DECISION

In light of the above, the hearing officer recommends that Ridgeway's Step III grievance be denied.

VI. NOTICE OF GOVERNING RULE

Pursuant to Admin. R. Mont. 2.21.8018(9), the Department Head shall issue the final administrative decision within 10 working days of receipt of this hearing summary and recommendation.

DATED this 5th day of October, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer